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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/587,654	06/05/2000	Scott C. Miller	2171	8911
25280	7590	06/17/2004		
MILLIKEN & COMPANY 920 MILLIKEN RD PO BOX 1926 SPARTANBURG, SC 29304			EXAMINER JUSKA, CHERYL ANN	
			ART UNIT 1771	PAPER NUMBER

DATE MAILED: 06/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

AS

<b>Office Action Summary</b>	<b>Application No.</b> 09/587,654	<b>Applicant(s)</b> MILLER ET AL.	
	<b>Examiner</b> Cheryl Juska	<b>Art Unit</b> 1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 26 March 2004.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 4-9, 11-22, 24, 25, 27-33, 35-37, 42-46, 48-52, 54-56 and 58 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 4-9, 11-22, 24, 25, 27-33, 35-37, 42-46, 48-52, 54-56, and 58 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
2. Claims 1, 4-9, 11, 19, 24, 25, 27-30, 33, 35, 37, 44-46, 48, 52, and 54 stand rejected under 35 USC 103(a) as being unpatentable over US 4,522,857 issued to Higgins in view of EP 048 968 issued to Porter et al. for the reasons of record.
3. Claims 1, 4-11, 15-17, 19-31, 33-39, 44-46, 48-54, 56, and 58 stand rejected under 35 USC 103(a) as being unpatentable over US 5,540,968 issued to Higgins in view of Higgins '857 and in further view of EP 048 968 issued to Porter et al. for the reasons of record.
4. Claims 12-14 and 18 stand rejected under 35 USC 103(a) as being unpatentable over Higgins '857 and Porter references as applied above, and in further view of EP 309 816 issued to Turner et al. for the reasons of record.
5. Claims 12-14 and 18 stand rejected under 35 USC 103(a) as being unpatentable over the cited Higgins '968, Higgins '857 and Porter references as applied above, and in further view of EP 309 816 issued to Turner et al. for the reasons of record.
6. Claims 16, 17, and 20-22 stand rejected under 35 USC 103(a) as being unpatentable over Higgins '857 and Porter references as applied above, and in further view of Higgins '968 for the reasons of record.

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7. Claim 55 stands rejected under 35 USC 103(a) as being unpatentable over Higgins '857 and Porter references as applied above, and in further view of US 6,089,007 issued to Hamilton et al. for the reasons of record.

8. Claim 55 stands rejected under 35 USC 103(a) as being unpatentable over the cited Higgins '968, Higgins '857 and Porter references as applied above, and in further view of US 6,089,007 issued to Hamilton for the reasons of record.

### *Response to Arguments*

9. Applicant has not amended the claims to overcome the rejections, but merely presents arguments against the rejections. The arguments filed with said amendment have been fully considered but they are not persuasive.

10. Applicant traverses the above rejections by arguing that a carpet tile constructed as claimed (i.e., with a low face weight and low cushion weight) would not have been expected to provide adequate performance characteristics. Applicant reiterates that the previously submitted Kilpatrick Declaration supports the present invention is contrary to the accepted wisdom in the art at the time of the invention. Additionally, applicant asserts that the experimental data of Porter and actual commercial practice further support this argument that the present invention is contrary to the accepted wisdom in the art.

11. The examiner respectfully disagrees. First, it is asserted that the "experimental data" of Porter does not establish that the accepted wisdom in the art teaches low face weight carpets must be paired with high weight foam coatings. Specifically, Porter is just one reference and does not necessarily speak for the entire art. Additionally, there is nothing in Porter that requires

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the foam backing to be of a high weight when in conjunction with a low face weight. In other words, there is no explicit statement or even suggestion that low face weights are only suitable with high foam weights. Furthermore, the so-called high cushion weights disclosed in Porter are not directly comparable to applicant's claimed cushion polymer weight. While applicant's weight is based upon the polymer (e.g., polyurethane foam) weight, Porter's weights are for the polymer and filler combined. [Note Porter page 13, 3<sup>rd</sup> paragraph and page 9, 1<sup>st</sup> paragraph.] Thus, applicant's assertion that the Porter reference supports the accepted wisdom that low face weights can only be employed with high cushion weights is unfounded.

12. Secondly, with respect to the assertion that actual commercial practice establishes the accepted wisdom requires high cushion weights with low face weights, there is no evidence on record to establish this comment as fact. In other words, it has not been established that prior art commercial carpet tiles having low face weights also had high cushion weights. Applicant's arguments cannot take the place of evidence.

13. Thirdly, with respect to the Kilpatrick Declaration, it is noted that said declaration was not dismissed but rather given full consideration in the prior Office Actions. However, it is reiterated that said declaration is insufficient to overcome the standing prior art rejection. Said declaration merely presents an opinion rather than objective evidence. There is no factual evidence to support Kilpatrick's opinion that the accepted wisdom of the art was that "an undesirable level of crush would occur if both pile weight and cushion weight were substantially reduced."

14. Applicant states the opinion is given "since there is no factual evidence regarding that accepted wisdom" (Remarks, page 4, lines 2-4). Yet, applicant also states, "Mr. Kilpatrick's

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opinion is based on actual commercial practices in the carpet industry and is consistent with all the facts in the prior art of record as well as actual commercial practices utilized in industry.”

These two statements seem contradictory in that proof of actual commercial practices can be considered factual evidence supporting the accepted wisdom in the art. However, no such evidence of actual commercial practice has been established on record yet. Attorney’s arguments cannot take the place of factual evidence. Additionally, it is noted that the opinion is not necessarily supported by the prior art of record, due to the Porter reference teaching weights that include fillers and not just the presently claimed polymer weights. As such, the declaration opinion does not outweigh the facts of record and the above prior art rejections are maintained.

### ***Conclusion***

15. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

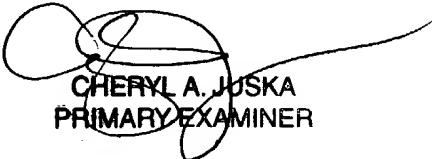
16. Any inquiry concerning this communication or earlier communications from the

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examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

17. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
CHERYL A. JUSKA  
PRIMARY EXAMINER